



May 2, 2002

Ms. Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Duncan C. Norton
General Counsel
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2002-2287

Dear Ms. Bergeron and Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162270.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for (1) documents from January 2000 to February 9, 2002 concerning contacts between TNRCC and Holnam Cement/Holcim Cement, Texas Industries, Inc., and North Texas Cement Company; (2) documents from January 2000 to February 9, 2002 concerning emission of nitrogen oxides as part of the Dallas-Fort Worth State Implementation Plan for ozone pollution; (3) documents from January 2000 to February 9, 2002, concerning TNRCC's rulemaking or policy regarding nitrogen oxide emissions from wet kiln cement plants in Ellis County; and (4) documents from January 2000 to February 9, 2002 relating to the EPA MOBILE6 air modeling for the Dallas-Fort Worth State Implementation Plan for ozone pollution. The Environmental Law Division and the General Counsel of TNRCC each submitted separate documents responsive to this request that they wish to withhold. Both the Environmental Law Division and the General Counsel indicate that they will release some of the requested information. However, they also claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

You each indicate that TNRCC has already requested a decision from this office with respect to some of the information responsive to the instant request. We ruled on that prior request in Open Records Letter No. 2002-1872 (2002). In Open Records Letter No. 2002-1872 (2002), this office determined that TNRCC was required to release the information the General Counsel submitted for our review. Because the information submitted by the General Counsel in this file is identical to the information submitted by the General Counsel in Open Records Letter No. 2002-1872 (2002), we find that TNRCC may not seek another ruling from this office on the information submitted by the General Counsel and must release the information to the requestor. *See* Gov't Code § 552.301(f). With respect to the information submitted by the Environmental Law Division in Open Records Letter No. 2002-1872 (2002), this office determined that some of the information was excepted from disclosure under sections 552.103 and 552.137 of the Government Code, while other portions of the information must be released. To the extent the information responsive to the instant request is the same as the information we found to be excepted from disclosure in Open Records Letter No. 2002-1872 (2002) and the facts and circumstances surrounding our prior ruling have not changed since the issuance of that ruling, TNRCC may rely upon Open Records Letter No. 2002-1872 (2002) as a previous determination to withhold the information we ruled could be withheld under sections 552.103 and 552.107. *See* Open Records Decision No. 673 (2001). However, to the extent the information responsive to the instant request is identical to information we previously held must be released, TNRCC must release the information. *See* Gov't Code § 552.301(f).

With respect to the information the Environmental Law Division submitted for our review, which you indicate was not ruled upon in Open Records Letter No. 2002-1872 (2002), we address your argument that the information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

TNRCC has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information

at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). TNRCC must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the information submitted by the Environmental Law Division relates to a lawsuit filed against TNRCC that is styled as *Cemex USA and Texas Industries, Inc. v. Texas Natural Resource Conservation Commission et al.*, Cause No. GN 001480 (201st Judicial District Court, Travis County). Based on your representation and our review of the information submitted by the Environmental Law Division, we conclude that TNRCC has demonstrated that the information relates to pending litigation to which it is a party. Therefore, TNRCC may withhold the information submitted by the Environmental Law Division under section 552.103 of the Government Code.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In conclusion, TNRCC may rely on our ruling in Open Records Letter No. 2002-1872 (2002) to withhold the information requested in the instant request if the facts and circumstances surrounding that ruling have not changed and the information sought in the instant request is identical to the information we found to be excepted from disclosure in Open Records Letter No. 2002-1872 (2002). However, to the extent the information sought in the instant request is identical to information we determined must be released in Open Records Letter No. 2002-1872 (2002), TNRCC must release the information. Finally, TNRCC may withhold the information submitted by the Environmental Law Division in response to the instant request under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

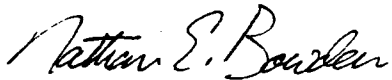
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 162270

Enc: Submitted documents

c: Mr. Jim Schermbeck
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(w/o enclosures)